IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF PENNSYLVANIA

WRS, INC. d/b/a WRS MOTION PICTURE LABORATORIES, a corporation,	)	CIVIL DIVISION
Plaintiff,	)	No.: 00-CV-2041
v.	)	JUDGE WILLIAM L. STANDISH
PLAZA ENTERTAINMENT, INC., a corporation, ERIC PARKINSON, an individual, CHARLES VON BERNUTH, JOHN HERKLOTZ, an individual,	)	
Defendants.		

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO
TRANSFER VENUE PURSUANT TO 28 U.S.C. 1404(a)

AND NOW COMES the Defendant, John Herklotz (hereinafter "Herklotz" or "Mr. Herklotz"), by and through its attorneys, Burns White & Hickton and John P. Sieminski, Esq., and files the within Brief in Support of Defendant's Motion to Transfer Venue Pursuant To 28 U.S.C. 1404(a) Change Of Venue, and avers the following:[1]

I. FACTUAL BACKGROUND

Plaintiff, WRS (hereinafter "Plaintiff") initiated the above-referenced cause of action by filing a Complaint on October 13, 2000. Defendant Herklotz is currently Eighty-Two (82) years of age and a resident of the State of California. At the time the Complaint in this action was filed, Mr. Herklotz was Seventy-Six

[1] Defendant is not alleging that venue is improper under 28 U.S.C. 1406(a).

(76) years of age. Although Mr. Herklotz has traveled to Pittsburgh on a number of occasions to attend to matters associated with this case, his health has recently deteriorated, making it much more difficult for him to travel than it has been in the past. Mr. Herklotz directs the Court to the letter from his physician attached to this Motion as Exhibit “A.”

Upon information and belief, the other individual and corporate defendants in this matter, Defendant Eric Parkinson, Defendant Charles Von Bernuth and Defendant Plaza Entertainment, Inc. (“Plaza”) are citizens of the State of California and either reside or have a principal place of business in the State of California. Defendant Herklotz fully intends, upon the trial of this matter, to call Mr. Parkinson and Mr. Von Bernuth as witnesses, both individually and in their respective capacities as officers and directors of Plaza. To the best of Mr. Herklotz’ knowledge, individual Defendants Parkinson and Von Bernuth have never traveled to Pittsburgh to attend to any matters pertaining to this case. In fact, the Court has entered defaults on the record as to Parkinson, Von Bernuth and Plaza. Accordingly, it is unrealistic to believe that Parkinson, Von Bernuth, or any representative of Plaza would attend a trial when it is scheduled. In addition, because of their location in California, these parties are beyond the subpoena power of this Court. (See F.R.C.P. 45 (c) (3) (A) (ii)).

In addition to the parties referred to in paragraph 3, above, Mr. Herklotz intends to call as witnesses at trial at least two other persons believed to be citizens and residents of the State of California, namely Neil Carrey, Esquire and Thomas Gehring, Esquire. Both of these individuals are beyond the subpoena power of this Court. (See F.R.C.P. 45 (c) (3) (A) (ii)).

II. LEGAL ARGUMENT

A. STATUTORY AND CASE LAW APPLICABLE TO THE TRANSFER REQUEST.

The Supreme Court has recognized that § 1404(a) was enacted to give a district court discretion when adjudicating motions for transfer according to an "individualized, case-by-case consideration of convenience and fairness" and it requires the courts to weigh and balance a number of case-specific factors. *Stewart Organization, Inc. v. Ricoh Corp.,* 487 U.S. 22, 29, (1988); (quoting *Van Dusen v. Barrack,* 376 U.S. 612, 622 (1964)). Furthermore, the Supreme Court has recognized that the purpose of this section is "to prevent the waste of 'time, energy and money' and 'to protect litigants, witnesses and the public against unnecessary inconvenience and expense.'" *Van Dusen v. Barrack,* 376 U.S. 612, 616 (1964) (quoting *Continental Grain Co. v. Barge FBL-585,* 364 U.S. 19, 26-27 (1960)).

While analyzing the doctrine of *forum non conveniens*, the Supreme Court in *Gulf Oil Corp. v. Gilbert* provided an outline of factors that a district court might examine when considering a motion to change venue. 330 U.S. 501, 67 S.Ct.

839 (1947); *see also Stewart Organization, Inc.,* 487 U.S. at 22 (Supreme Court applying the factors it first outlined in *Gulf Oil Corp. v. Gilbert*). The Supreme Court has also recognized that 28 U.S.C. § 1404(a) gives the court broader discretion to transfer venue to a different federal district court, than under the narrower common law doctrine of *forum non conveniens*, *Norwood v. Kirkpatrick*, 349 U.S. 29, 30, 75 S.Ct. 544, (1955). In relation to the factors enumerated by the Supreme Court, although a plaintiff's choice of forum is entitled consideration, the right of a plaintiff to choose a forum is not absolute. *Piper Aircraft Company v. Reyno,* 454 U.S. 235, 256 (1981).

This Court is vested with the power to transfer the within cause of action to a more appropriate forum pursuant to 28 U.S.C. 1404(a), which provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

The burden of establishing the need for transfer rests entirely on the moving party. *Jumara v. State Farm Insurance Company,* 55 F. 3d. 873, 879 (1995) quoting (*Shutte v. Armco Steel Corp.*, 431 F. 2d. 22, (1970)). Courts have not limited their consideration to the elements outlined in 28 U.S.C. § 1404(a) (convenience of parties and witnesses, or interest of justice). *Id*. Transfer of venue pursuant 28 U.S.C. § 1404(a) is established by taking into consideration all the relevant factors, and determining on balance that the litigation would more conveniently proceed, and the interest of justice would be better served, by transferring the cause of action to a different forum. *Id.*

When determining the type of motion at bar, district courts must first determine whether venue would be proper in the transferee district. *Id.* If the first prong of the inquiry is satisfied (which it is here), courts then determine whether a transfer would be appropriate by weighing a series of factors. *Id.* The Court of Appeals for the Third Circuit has recognized that, "while there is no definitive formula or list of factors for the court to consider, *see* 1A Pt. 2 Moore's ¶ 0.345[5], at 4363, courts have considered many variants of interests protected by the language of § 1404(a)." *Id*.

Under the balancing test, the private factors for the court to consider have included (a) the plaintiff's forum preference; (b) the defendant's preference; (c) whether the claim arose elsewhere; (d) the convenience of the parties as indicated by their relative physical and financial condition; (e) the convenience of the witnesses, but only to the extent that the witnesses may actually be unavailable for trial in one of the for a; and (f) the location of books and records (similarly limited by to the extent that the files could not be produced in the alternative forum). *Id*.

Federal district courts outside of the Third Circuit have granted motions to transfer venue under 28 U.S.C. § 1404(a) due to the poor health of one of the parties, *First City Federal Savings Bank v. Register*, 677 F.Supp. 236, (S.D.N.Y., 1988). In *First City,* the defendant's motion to transfer venue from the Southern District Court of New York to the Southern District Court of Florida was granted on account of the convenience to the defendant and his witnesses, 677 F. Supp. 236, (S.D.N.Y., 1988). The defendant was in very poor health, and his physicians averred that he would not be able to travel to New York to attend trial. *Id* at 237. Also, the plaintiff stated that witnesses he intended to call at trial could not be compelled by the court to testify in New York, but they could be compelled in Florida. *Id*. The court recognized, therefore, that the defendant would have a much greater chance of attending trial in Miami, only 15 miles from his home. *Id*. The court granted the motion to transfer venue to Florida, ruling that the inconvenience to the plaintiff of holding the trial in Florida was overwhelmed by the convenience to the defendant and his witnesses. *Id.* at 238.

B. TRANSFER OF VENUE TO THE CENTRAL DISTRICT OF CALIFORNIA IS APPROPRIATE IN THIS CASE.

The threshold question this Court must determine is whether this action could have originally been brought in the venue to which the Defendant is seeking to transfer. Under 28 U.S.C. § 1391(a)(1), in an action founded solely on diversity of citizenship, an action may be brought in, "a judicial district where any defendant resides, if all the defendants reside in the same state." In this case, all the individual defendants reside in the Central District of California. Further, under 28 U.S.C. § 1391(c), when the defendant is a corporation, venue is proper in any judicial district in which it is subject to personal jurisdiction at the time the action was commenced. Plaza Entertainment, Inc. was located in and doing business in the Central District of California at the time the action commenced. Therefore, in this case, all of the defendants reside in the Central District of California, and were doing business in the Central District of California when the cause of action commenced. Consequently, this initial threshold is easily satisfied, thus the United States Central District Court of California would be an appropriate venue for the instant matter.

C. TRANSFER OF VENUE TO THE CENTRAL DISTRICT OF CALIFORNIA WOULD BE IN THE INTEREST OF JUSTICE AND THE CONVENIENCE OF MR. HERKLOTZ

1. Relevant Factors

First, in reviewing the relevant factors relating to this cause of action, the two factors relevant in this case are the convenience of the witnesses to the extent that they will be unavailable to testify, and the convenience of Mr. Herklotz in terms of his physical condition.

Upon information and belief, the other individual and corporate defendants in this matter, Defendant Eric Parkinson, Defendant Charles Von Bernuth and Defendant Plaza Entertainment, Inc. ("Plaza") are citizens of the State of California and either reside or have a principal place of business in the State of

California. Defendant Herklotz fully intends, upon the trial of this matter, to call Mr. Parkinson and Mr. Von Bernuth as witnesses, both individually and in their respective capacities as officers and directors of Plaza. To the best of Mr. Herklotz' knowledge, individual Defendants Parkinson and Von Bernuth have never traveled to Pittsburgh to attend to any matters pertaining to this case. In fact, the Court has entered defaults on the record as to Parkinson, Von Bernuth and Plaza. Accordingly, it is unrealistic to believe that Parkinson, Von Bernuth, or any representative of Plaza would attend a trial when it is scheduled. In addition, because of their location in California, these parties are beyond the subpoena power of this Court. (See F.R.C.P. 45 (c) (3) (A) (ii)).

In addition to the parties referred to above Mr. Herklotz intends to call as witnesses at trial at least two other persons believed to be citizens and residents of the State of California, namely Neil Carrey, Esq. and Thomas Gehring, Esq. Both of these individuals are beyond the subpoena power of this Court. (See F.R.C.P. 45 (c) (3) (A) (ii)). These witnesses are within the subpoena power of the Central District of California, thus making them more accessible at trial. Having these witnesses testify in the Central District Court of California will be much less expensive and more convenient than if the matter were to remain in the Western District of Pennsylvania. Mr. Herklotz would be severely prejudiced if the case were to proceed in the Western District of Pennsylvania without the availability of these witnesses.

In addition, Mr. Herklotz' health has recently been deteriorating. It has become extremely difficult for Mr. Herklotz to make the long trip of over 2,000 miles to Pittsburgh to defend himself. Air travel in the post 9/11 world has become extremely inconvenient, stressful, and fatiguing. This is especially true for someone in Mr. Herklotz' position, being 82 years of age and in deteriorating health. The continuing deterioration of Mr. Herklotz' health may soon make trips to Pittsburgh to defend this case an impossibility.

Therefore, in light of all the relevant factors, the Defendant contends that the Central District Court of California would be a more convenient forum for this action.

III. CONCLUSION

In summary, in consideration of the Mr. Herklotz' health and the location and availability of his key witnesses clearly favors transferring this case to the Central District Court of California, which will best serve the interests of justice and the convenience of the defendant. Therefore, Defendant, John Herklotz, respectfully requests that this Honorable Court grant Defendant's Motion to Transfer Venue Pursuant to 28 U.S.C. 1404(a) to the more appropriate Central District of California.

Respectfully submitted,

BURNS, WHITE & HICKTON

By: *John P. Sieminski*

John P. Sieminski, Esq.
Attorney for Defendant,
John Herklotz